

DJW/byk

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

B-S STEEL OF KANSAS, INC.,

Plaintiff,

v.

Case No. 01-2410-JAR

**TEXAS INDUSTRIES, INC.,
et al.,**

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's Motion to Compel Production of Documents (doc. 179) and Motion to Compel Production of Documents and Information (doc. 207). Plaintiff moves the Court for an order compelling production of certain documents from Texas Industries, Inc., Chaparral Steel Texas, Inc., and Chaparral Steel Company, Inc. (collectively "the TXI Chaparral Steel defendants"). For the reasons set forth below, the motions will be granted in part and denied in part.

I. Background Information

Plaintiff asserts federal claims under the Robinson-Patman Act¹ for price discrimination in its purchase of wide flange steel manufactured and sold by Chaparral Steel Midlothian, L.P., ("Chaparral Midlothian") a subsidiary of Texas Industries, Inc. and Chaparral Steel Company, Inc., as well as state law claims of fraud, misrepresentation and intentional interference with prospective business relations. For

¹15 U.S.C. § 13(a).

eighteen years up until May 2001, Plaintiff purchased wide flange steel from Chaparral Midlothian. Plaintiff's Amended Complaint (doc. 17), filed on December 6, 2001, alleges that "[b]eginning sometime before May 2000 and continuing to the present, [the] TXI Chaparral Steel [defendants] sold wide flange steel to other distributors who compete with B-S Steel (the "Favored Buyers") on one or more occasions at prices that were lower than the published list prices charged to B-S Steel for comparable products of like grade and quality purchased contemporaneously with those sales to the Favored Buyers." Am. Compl. ¶ 46.

During the course of discovery, Plaintiff submitted several requests for documents to the TXI Chaparral Steel defendants. Specifically, Plaintiff's Request for Production No. 1 sought "copies of all documents relating to agreements between [the] TXI Chaparral Steel [defendants] and [certain identified] third-parties to purchase and/or sell wide flanged steel during the period January 1, 1997 to the present." Request No. 2 sought "copies of all documents, including but not limited to invoices, relating to any sales of wide flange steel by [the] TXI Chaparral Steel [defendants] to [certain identified] third parties during the period January 1, 1997 to the present." In response to Plaintiff's discovery requests, the TXI Chaparral Steel defendants produced their sales data for the identified third parties through December 31, 2001. Plaintiff thereafter requested that the TXI Chaparral Steel defendants supplement their prior responses by producing documents regarding their Port Pricing Program, including special pricing schedules referenced during the deposition of a third-party witness, and their calendar year 2002 sales data for wide flange steel.

Plaintiff also has propounded discovery to the TXI Chaparral Steel defendants, including requests for production of documents, interrogatories, and deposition questions posed to current and former

employees of the TXI Chaparral Steel defendants. The TXI Chaparral Steel defendants have asserted relevancy objections to these discovery requests to the extent that they seek information after May 2001, the date of Plaintiff's last purchase of wide flange steel from Chaparral Midlothian. After attempting to confer with the TXI Chaparral Steel defendants to resolve the issue without court action, as required by Fed. R. Civ. P. 37(a)(2)(A) and D. Kan. Rule 37.2, Plaintiff filed the Motions to Compel Production of Documents currently pending before the Court.

II. Discussion

A. The TXI Chaparral Steel defendants' Calendar Year 2002 Sales Data

The Court notes that the TXI Chaparral Steel defendants state in their Memoranda in Opposition to Plaintiff's motions to compel (docs. 182, 209) that they have already produced their 2002 sales records relating to their customers who allegedly received favored prices (in tons and dollars, by month). In light of this information, Plaintiff's Motion to Compel Production of the TXI Chaparral Steel defendants' calendar year 2002 sales data for wide flange steel will be denied as moot.

B. The TXI Chaparral Steel defendants' Port Pricing Program and Other Post-May 2001 Requested Information

As the TXI Chaparral Steel defendants have already produced their 2002 sales records to Plaintiff, the only remaining issues in this motion are whether they should be required to produce documents regarding their Port Pricing Program, which did not begin until late 2001 or early 2002, and other requested post-May 2001 information, when Plaintiff's last purchase of wide flange steel occurred in May 2001. The TXI Chaparral Steel defendants object to producing any information, including their Port

Pricing Program, for the time period after Plaintiff's last purchase of wide flange steel in May 2001.² They contend that documents after May 2001 are not relevant to this action, and they should therefore not be required to produce these documents. Plaintiff argues that this information is relevant because, although it last purchased wide flange steel from a subsidiary of the TXI Chaparral Steel defendants in May 2001, it seeks injunctive relief from the TXI Chaparral Steel defendants' *ongoing* conduct and it does not need to be a direct purchaser to bring claims under the Robinson-Patman Act.

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."³

Relevancy is broadly construed, and a request for discovery should be considered relevant if there is "any possibility" that the information sought may be relevant to the claim or defense of any party.⁴ A request for discovery should be allowed "unless it is clear that the information sought can have no possible bearing" on the claim or defense of a party.⁵ When the discovery sought appears relevant on its face, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the

²The TXI Chaparral Steel defendants point out in their Memorandum in Opposition to Plaintiff's Motion to Compel (doc. 209) that the Court, on September 4, 2001, dismissed Plaintiff's antitrust and tort claims arising out of transactions occurring after April 3, 2001. However, these claims were only dismissed against defendant Chaparral Midlothian and not against the TXI Chaparral Steel defendants.

³Fed. R. Civ. P. 26(b)(1).

⁴*Sheldon v. Vermonty*, 204 F.R.D. 679, 689-90 (D. Kan. 2001) (citations omitted).

⁵*Id.*

requested discovery (1) does not come within the broad scope of relevance as defined under Rule 26(b)(1), or (2) is of such marginal relevance that the potential harm the discovery may cause would outweigh the presumption in favor of broad disclosure.⁶ Conversely, when relevancy is not apparent on the face of the request, the party seeking the discovery has the burden to show the relevancy of the request.⁷

Along with the general liberal policy favoring discovery set out in the federal rules, the Court also notes that several courts have liberally construed the discovery rules to permit discovery in antitrust cases.⁸ In those cases, the courts held that the temporal scope of discovery in antitrust cases should not be confined to the limitations period of the antitrust statutes⁹ or the damage period,¹⁰ and plaintiff is ordinarily permitted to discover defendant's activities "'for a reasonable period' of time antedating the earliest possible date of the actionable wrong."¹¹ This general policy of allowing liberal discovery in antitrust cases

⁶*Scott v. Leavenworth Unified Sch. Dist. No. 453*, 190 F.R.D. 583, 585 (D. Kan. 1999).

⁷*Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 442, 445 (D. Kan. 2000).

⁸*Fed. Trade Comm'n v. Lukens Steel Co.*, 444 F.Supp. 803, 805 (D.D.C. 1977); *Kellam Energy, Inc. v. Duncan*, 616 F.Supp. 215, 217 (D. Del.1985); *In re Potash*, No. 3-93-197, MDL No. 981, 1994 WL 1108312, at *14 n.20 (D. Minn. Dec. 5, 1994); *Quadrozzi v. City of New York*, 127 F.R.D. 63, 75 (S.D.N.Y. 1989); *Maritime Cinema Serv. Corp. v. Movies en Route, Inc.*, 60 F.R.D. 587 (S.D.N.Y. 1973); *Quonset Real Estate Corp. v. Paramount Film Distrib. Corp.*, 50 F.R.D. 240 (S.D.N.Y. 1970).

⁹*Kellam Energy*, 616 F.Supp. at 218; *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 95 F.R.D. 398, 399 (S.D.N.Y. 1982) ("discovery in antitrust cases routinely goes beyond the statutory period").

¹⁰*Maritime Cinema*, 60 F.R.D. at 591 ("Discovery in antitrust cases routinely goes beyond the damage period, particularly where it is necessary to establish intent or the pattern of a conspiracy.").

¹¹*Quonset*, 50 F.R.D. at 241.

has been permitted by courts when there are allegations of conspiracy and where “broad discovery may be needed to uncover evidence of invidious design, pattern, or intent.”¹² Other courts have found it not unusual “to probe matters at the heart of the business dealings and competitive relationships of the parties” in an antitrust action where the essence of the charge is that defendants have engaged in activity in restraint of competition.¹³

The TXI Chaparral Steel defendants cite a recent Southern District of New York case, *Innomed Labs, LLC v. Alza Corp.*,¹⁴ for the proposition that discovery requests for product sales to competing purchasers are not relevant when the documents requested are outside the time period that plaintiff purchased the products upon which it is claiming price discrimination.

While the Southern District of New York’s decision in *Innomed Labs* is not binding precedent on this Court, the case is instructive. In *Innomed Labs*, plaintiff, a distributor of the 24-hour cold remedy produced by defendant, asserted a claim for price discrimination as a result of defendant’s disparate pricing of the cold remedy product. Plaintiff requested production of documents regarding defendant’s relationship with a prior distributor and its successor. The court found the requested documents were not relevant to any claim or defense and denied plaintiff’s request for production. In making its decision, the court focused on the “competitive conditions in the market in which plaintiff was competing” to determine the relevancy

¹²*United States v. Dentsply Int’l, Inc.*, No. Civ. A. 99-5 MMS, 2000 WL 654286, at *5 (D. Del. May 10, 2000) (citing *Kellam Energy*, 616 F.Supp. at 217).

¹³*Quadrozzi*, 127 F.R.D. at 75; *Maritime Cinema*, 60 F.R.D. at 590 (quoting *Covey Oil Co. v. Cont’l Oil Co.*, 340 F.2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965)).

¹⁴No. 01CIV8095HBRLE, 2002 WL 31015595, at *4 (S.D.N.Y. Sept. 6, 2002).

of discovery requests concerning other competitors.¹⁵ The court found that because the prior distributor had ceased distributing the cold remedy before plaintiff entered the market, information concerning pricing between defendant and the prior distributor was not relevant to plaintiff's price discrimination claim.

While the Court agrees with Plaintiff that the facts of the *Innomed Labs* case are distinguishable from the facts of the case at bar, some basic discovery relevancy principles can be derived from the *Innomed Labs* case. First, in the context of a price discrimination suit, a seller's pricing information to another buyer competing with plaintiff does not appear relevant if that information pertains to a time period clearly before plaintiff entered the market. This resonates with the requirement that sales to two different purchasers be reasonably contemporaneous with each other.¹⁶ Second, the relevancy of pricing information between the seller and other competing buyers should be evaluated based upon whether the requested information would provide "important information for an analysis of the product market in question."¹⁷

Applying these principles, the Court determines that while the TXI Chaparral Steel defendants no longer sold wide flange steel to Plaintiff during the implementation of their Port Pricing Program in late 2001 and early 2002, information on the TXI Chaparral Steel defendants' Port Pricing Program would be relevant to show whether their alleged actions in selling wide flange steel to the favored buyers at a lower price than to Plaintiff was for the effect of "lessening competition or creating a monopoly or injuring,

¹⁵*Id.* at *4.

¹⁶*Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 683 (10th Cir.), *cert denied*, 469 U.S. 854 (1984).

¹⁷*Innomed Labs*, 2002 WL 31015595, at *4.

destroying, or preventing competition with any person who either grants or receives the benefit of the alleged discrimination.”¹⁸ This information would also be relevant to characterizing the competitive conditions in the market in which Plaintiff was competing and to make inferences regarding how the product market changed after TXI Chaparral Steel stopped selling wide flange steel to Plaintiff. The Court therefore holds that Plaintiff is entitled, under the liberal discovery provisions of the Federal Rules of Civil Procedure, to information regarding the TXI Chaparral Steel defendants’ Port Pricing Program even though Plaintiff’s last purchase occurred in May 2001. As the Court finds that documents with information on the TXI Chaparral Steel defendants’ Port Pricing Program would be relevant to Plaintiff’s Robinson-Patman Act claims, Plaintiff’s Motion to Compel Production of documents regarding the TXI Chaparral Steel defendants’ Port Pricing Program is therefore granted.

The Court also finds that the TXI Chaparral Steel defendants’ objection to producing any post-May 2001 information should be overruled. The TXI Chaparral Steel defendants contend that the requested post-May 2001 information is not relevant because Plaintiff does not have standing to bring price discrimination claims after the date of its last purchase in May 2001 because the Robinson-Patman Act requires that the defendant make a discriminatory sale to the plaintiff. In essence, the TXI Chaparral Steel defendants urge the Court to not allow any discovery after May 2001 based upon their assertion that

¹⁸The Robinson-Patman Act provides that it shall be “unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them [subject to certain exceptions and justifications]” 15 U.S.C. § 13(a)

Plaintiff was not a purchaser of their products after May 2001 and thus did not have standing after that date. The Court declines to so narrowly circumscribe the discovery parameters in this case. While precluding unlimited and unfocused discovery into irrelevant areas is a valid interest to be served, this does not justify unduly restraining a plaintiff's legitimate discovery interests.¹⁹ Given Plaintiff's allegation that the price discrimination was a continuing violation for which it seeks injunctive relief and the implications that could be drawn from the requested post-May 2001 information about the TXI Chaparral Steel defendants' *pre*-May 2001 actions, the Court holds that the TXI Chaparral Steel defendants' objection to producing any post-May 2001 information should be overruled.

In sum, Plaintiff is entitled to conduct discovery that will allow it a reasonable opportunity to prosecute its claims. The Court is not unmindful of the fact that the TXI Chaparral Steel defendants should not be subjected to discovery of documents from unreasonably remote time periods. In the instant case, however, the documents Plaintiff seeks are post-May 2001. These documents which, at the most, antedate the institution of this action by two years, are not unreasonably or extremely remote in time. Thus, the discovery Plaintiff seeks is limited to a reasonable period and will not be unduly burdensome to the TXI Chaparral Steel defendants. These documents must, therefore, be produced, except to the extent that they are protected by an asserted privilege.

III. Fees and Expenses Incurred in Relation to these Motions to Compel

Pursuant to Federal Rule of Civil Procedure 37(a)(4)(C), when a court grants in part and denies in part a motion to compel, the court may "apportion the reasonable expenses incurred in relation to the

¹⁹*See In re Potash*, 1994 WL 1108312, at *13.

motion among the parties and persons in a just manner.”²⁰ Here, the Court finds it appropriate and just for each party to bear its own expenses and fees incurred in connection with the motions to compel.

IT IS THEREFORE ORDERED that Plaintiff’s Motion to Compel Production of Documents (doc. 179) is granted in part and denied in part. Plaintiff’s Motion to Compel Production of Documents (doc. 179) relating to the TXI Chaparral Steel defendants’ calendar year 2002 sales data for wide flange steel is denied as moot. Plaintiff’s Motion to Compel Production of Documents regarding the TXI Chaparral Steel defendants’ Port Pricing Program is granted. **Within thirty (30) days of the date of this Order**, the TXI Chaparral Steel defendants shall produce documents related to their Port Pricing Program, including special pricing schedules, to Plaintiff.

IT IS FURTHER ORDERED that Plaintiff’s Motion to Compel Production of Documents and Information (doc. 207) is granted. **Within thirty (30) days of the date of this Order**, the TXI Chaparral Steel defendants shall supplement their previous interrogatory answers and responses to requests for production of documents to include all responsive post-May 2001 information. The TXI Chaparral Steel defendants shall also, upon reasonable notice by Plaintiff, produce a witness to answer deposition questions, which are not otherwise objectionable, regarding the post-May 2001 information.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 22rd day of July, 2003.

s/ David J. Waxse
David J. Waxse

²⁰Fed. R. Civ. P. 37(a)(4)(C).

United States Magistrate Judge